# RECENT IMPORTANT DECISIONS

ADMINISTRATORS—RIGHT TO CONVEY INCHOATE HOMESTEAD.—One Morrison, duly qualified, settled upon unsurveyed government land with the intention of taking it as a homestead; after settlement thereon he proceeded to improve it, built a dwelling house, barn and woodshed, and cleared, fenced, plowed and cultivated about 25 out of the 40 acres of the tract. The said improvements and the right to the possession of said land constituted the whole estate of Morrison who died intestate, before his right to a patent was consummated, without leaving any heirs who were citizens of the United States. Plaintiff immediately took possession of the land with the intention of making it a homestead, and began improving and cultivating it. The administrator of Morrison, for the purpose of paying debts and expenses of administration, sold the land to defendant who ousted the plaintiff. *Held*, that the administrator had no right to sell for the benefit of creditors, and that the land was open for the first squatter, in this case the plaintiff. *Towner* v. *Rodegeb* (1903), — Wash. —, 74 Pac. Rep. 50.

There are not many cases covering this phase of the law. The only ones cited by the court which seem to be in point are *Gjerstadengen* v. *Van Duzen*, 7 N. D. 612, 76 N. W. Rep. 233, 66 Am. St. Rep. 679, and *Bowen* v. *Burnett*, 1 Pin. (Wis.) 658, neither of which refers to any authorities upon which they are based. Under the decisions of the Land Department concerning an earlier law, 9 Land Decisions, Dep. Int. 599, it is held that an executor or administrator has no authority to consummate the inchoate claim of a deceased homesteader for the benefit of creditors. On the other hand, *Burch* v. *McDaniel*, 2 Wash. T. 58, 3 Pac. Rep. 586 and *Grover* v. *Hawley*, 5 Cal. 486, hold that the possessory rights of a homesteader who has only an inchoate right to a patent are transferable. Sec. 2291 U. S. Rev. Stat. (1901) gives the settler the power to devise his rights, and if he can devise them there seems to be no good reason why in the absence of qualified heirs the creditors should not have the benefit of them. Where the entire estate consists of the improvements on the intended homestead and the inchoate right to it, there is no apparent justification for preferring outsiders to bona fide creditors. If the case is correctly decided there is a looseness in the law which ought to be remedied.

AGENCY—SCOPE OF AUTHORITY—SUNDAY CONTRACT.—An agent was authorized to trade a horse. He consummated and fully executed the transaction on Sunday, in violation of the Sunday laws. The principal sued to replevy the horse, claiming that the illegal act of the agent did not bind her. *Held*, that she could not recover, as the act, although unlawful, was within the scope of the authority. *Rickards* v. *Rickards* (1903), — Md. — , 56 Atl. Rep. 397.

On the question whether recovery of chattels will be allowed where the sale or exchange is in violation of Sunday laws, the authorities are in direct conflict. Some courts will aid the plaintiff in disaffirmance, but the majority of the courts will leave the parties where they are found. MECHEM, SALES, § 1053. The majority rule seems to be the theory of the principal case. The fact that an agent intervenes is of no moment, for the principal may be liable for acts penal and even criminal. *Hall* v. *R. R. Co.*, 44 W. Va. 36; *State* v. *Kittelle*, 110 N. C. 560. The test is the scope of authority. The decision of the principal case appears, therefore, to be sound.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—ACTION TO SET ASIDE—ELECTION—RES ADJUDICATA.—A firm of carriage manufacturers made an

assignment for the benefit of creditors. A judgment creditor sued to set aside the assignment on the ground of fraud and was successful as to a portion of the property transferred to the assignee. No benefit, however, was obtained from such judgment, and the creditor now seeks to prove his claim under the assignment. *Held*, that the claim may be proved, as no election has been exercised to take in hostility to the assignment, and the judgment does not constitute a bar to such relief. *In re Garver* (1903), — N. Y. —, 68 N. E. Rep. 667.

The precedent followed by the court is that established in *Mills* v. *Parkhurst*, 126 N. Y. 89. A dissenting opinion calls attention to the fact that these cases, though in other respects similar, differ in that in the Mills case the action to set aside the assignment was unsuccessful, while in this case the action was successful. The court holds that the Mills case notwithstanding this difference is directly in point, as an election of remedies is not determinable by the result of a suit but by its commencement. According to the Mills case, the commencement did not constitute an election to take in hostility to the assignment. The doctrine of res adjudicata does not control in this case to bar the creditor from proving his claim. The judgment setting aside the assignment of a portion of the property did not imply that the creditor had no other remedy than proceeding against such property, but should he fail to secure money enough to satisfy his claim under this proceeding, he could resort to any other proceedings necessary to reach the debtor's property, and so could share in the distribution of the assigned estate. The Mills case cited above seems to be the only case in point with this decision, but see *Thompson* v. *Fry*, 51 Hun, 296.

BANKRUPTCY—DISCHARGE—DEBT CREATED IN FIDUCIARY RELATION—LAUNDRY AGENT.—Defendant acting as laundry agent for plaintiff has the duty of collecting and forwarding articles to the laundry, receiving them back and distributing them, making collections and remitting after deducting the stipulated commission. After the agency has continued for somewhat over a year, plaintiff brings suit against defendant to recover a balance due. Defendant pleads as defense a discharge in bankruptcy under the United States statute. *Held*, that a fiduciary relation exists between defendant and plaintiff so that under Bankr. Act 1898 § 17 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. Stat. 1901, p. 3428]) a discharge does not avail defendant against plaintiff's claim. *Shipley* v. *Platts* (1903), — So. Dak. — 97 N. W. Rep. 1.

The section of the bankruptcy act referred to provides that the discharge of a bankrupt shall not affect debts created by his misappropriation or defalcation while acting in any fiduciary capacity. The only question in the case is whether any such fiduciary relation exists between defendant and plaintiff. If there is simply the relation of debtor and creditor, the section does not apply. It has been held that the section applies only to technical or special trusts to be distinguished from those implied by law from the contract. *Bracken* v. *Milner*, 104 Fed. Rep. 522. So it has been held that a debt due by a bankrupt in the character of commission merchant is not within the section. *In re Basch*, 97 Fed. Rep. 761; *Knott* v. *Putnam*, 107 Fed. Rep. 907. In the present case the court says the obligation of the defendant partakes more of a fiduciary character than that of the ordinary commission merchant. In the case of the commission merchant the contract may involve but a single transaction, while in this case a confidential relation had existed for more than a year. For supporting authority, see *Lemcke* v. *Booth*, 47 Mo. 385, 4 Am. Rep. 326; *In re Kimball*, Fed. Cas. No. 7, 769; *Matteson* v. *Kellogg*, 15 Ill. 547.